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SUBJECT: Superintendent of Competition's Active Agenda

11. (SBU) Summary. The Superintendent of Competition (SC), established less than two years ago has been aggressively pursuing cases of alleged non-competitive practices in El Salvador. It recently imposed fines against gasoline and electricity distribution companies and commodity brokers. Local affiliates of AES and Esso appealed these decisions and raised concerns over due process issues and the merits of each case. The SC is studying the poultry sector and wants to look at the cement, fertilizer and regional airline industries, all areas suspected to be controlled by powerful, local oligopolies. While the SC is a reputable agency, there appears to be legitimate questions about the independent agency's lack of experience. The SC's limited expertise in economic analysis could seriously affect the credibility of the institution and, ironically, lead to higher prices for the consumer. End Summary.

Taking on the Internationals

12. (U) In September, the Superintendent leveled fines of \$247,080 against two electricity distributors, including a Salvadoran affiliate of the U.S.-based AES Corporation, for allegedly restricting competition by blocking two companies from entering the power distribution business. After the SC reaffirmed its ruling on October 4, AES filed an appeal to the Salvadoran Supreme Court. AES argues that it was following Salvadoran law, which requires companies to have an approved electricity rate schedule before engaging in power distribution. After the company filed a complaint with the SC, the electricity regulator (SIGET) approved the company's rate schedule and AES granted them access to the electricity network before the SC ruling. AES representatives have emphasized to Econoffs their broader concern over the lack of clear rules on how new distributors will share service requirements and network maintenance costs.

Questions of Due Process

13. (U) In its second high-profile case against international companies, the SC imposed maximum fines of \$852,000 against the local affiliates of Esso (Exxon) and Shell. SC determined that Esso and Shell had a dominant position in the Salvadoran market because both purchased their fuel from RASA, a refinery jointly-owned by the two companies' parent companies. According to the SC, the companies abused that dominant position because they suggested prices for different zones of the country. The SC dismissed a separate complaint against Texaco for the same zone pricing practices, concluding that Texaco does not have a dominant market position, although their market share is larger than Shell's. Esso and Shell argue that Salvadoran law has no provision for both firms to be grouped together as a single entity and they should not be

considered as acting in concert, since the SC specifically found no evidence of collusion between them to set prices.

¶4. (U) Esso also argues that its due process rights were violated because the SC changed the definition of the relevant market at the last minute (in the final order imposing the fines) and did not give the company an opportunity to properly defend itself. It claims that the SC failed to consider expert evidence in Esso's favor and did not provide Esso with the full report from the expert employed by the SC to study the hydrocarbons sector.

¶5. (U) On November 6, the SC reaffirmed its October 1 ruling and ordered Esso and Shell to eliminate the alleged non-competitive practices (zone pricing) within 45 days. Esso plans to file an appeal to the Administrative Division of Salvadoran Supreme Court to reverse the SC's decision based on due process concerns. If this appeal does not succeed, Esso can appeal to other Supreme Court divisions to contest the legal merits of the SC decision. Esso will also ask the Supreme Court to delay enforcement of the SC ruling until the Supreme Court issues its ruling. Though confident in its legal case, Esso is concerned about the competitive disadvantage it will face if it is unable to price by zone while Texaco is allowed to continue the practice during a potentially lengthy legal process.

¶6. (SBU) In addition to frequent discussions with Embassy officials, Exxon has discussed this case with several USG agencies in Washington. Post has consulted competition law specialists from the Federal Trade Commission (FTC) and the Department of Justice (DOJ), both of which have developed positive relations with the SC. USAID's Economic Growth Office has offered to provide technical assistance to the SC, but the Superintendent has resisted some proposed activities, supposedly to maintain its independence. The SC has expressed interest in technical assistance from counterpart U.S. competition agencies (FTC and DOJ) which could also lead to greater USAID support.

SC: Good Reputation but Lacks Experience

¶7. (SBU) We have spoken with several USG lawyers who have worked with the Superintendent and speak highly of her. She enjoys a reputation as an honest, capable attorney with long experience as a technical advisor in the Ministry of Economy. However, the SC is a young institution only beginning to apply competition law with few domestic legal precedents to follow. With a small staff and limited budget, the SC has undertaken an ambitious agenda, contracting numerous studies through independent consultants, and investigating an array of cases involving influential companies. In addition to ongoing studies of the transportation, pharmaceutical, telecommunications and poultry sectors, the Superintendent told Econoff she wants to study the cement, fertilizer and regional airline industries. In analyzing the recent rulings against Esso and AES, another legal analyst underscored the SC's limited capacity for economic analysis. Ironically, according to the legal analyst, the SC's lack of economic analysis could lead to even higher gasoline prices for the consumer. With limited ability to determine whether alleged uncompetitive practices are economically harmful to consumers, the SC tends to focus on legal issues and market structure.

Competition Law Reforms

¶8. (U) In October, the National Assembly approved reforms to competition law that will increase the investigative power of the Superintendent, allow the SC to issue preventive orders to stop alleged anticompetitive practices and increase maximum fines to 6% of gross annual revenues. In approving these reforms, one legislator noted that under the reformed law, the Superintendent could have fined Esso and Shell up to \$24 million.

Comment

¶9. (SBU) The SC is doing important work in a country where traditionally a small group of people control much of the economy. However, it is critical that the job be done right or the SC might,

at the very least, unnecessarily restrict legitimate business activities that do not harm consumers, and damage its own credibility in the process. Record oil and energy prices fuel criticism of the sector. However, Esso and AES appear to have raised legitimate concerns about how the SC is applying competition law. Post has emphasized our interest in protecting U.S. companies' due process rights and will continue to explore opportunities for U.S. competition agencies and USAID to provide technical assistance to the SC.

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